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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 899

UNIVERSAL TERMINAL & STEVEDORING CORP.,

Petitioner,

against

ISBRANDTSEN COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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1. The decision of the Court of Appeals of the State of New York is, we submit, in direct conflict with the decisions of this Court in *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124, and *Weyerhaeuser S. S. Co.* v. *Nacirema Co.*, 355 U. S. 563, and unduly limits the scope of those decisions; it is also in conflict with the decision of the Court of Appeals for the Second Circuit in *Booth Steamship Co.* v. *Meier & Oelhaf Co.*, 262 F. 2d 310 6

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UNIVERSAL TERMINAL & STEVEDORING CORP.,

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ISBRANDTSEN COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, Universal Terminal & Stevedoring Corp., prays that a writ of certiorari issue to review the judgment and order of the Court of Appeals entered in the above case on January 25, 1962.

Opinions Below

The opinion of the trial judge is not reported. It is printed in the Appendix hereto (p. 15).

The opinion of the Appellate Division, Second Judicial Department, is reported at 13 A. D. 2d 977, 216 N. Y. S. 2d 433, and is printed in the Appendix hereto (pp. 12-14).

The decision of the Court of Appeals is reported at 11 N. Y. 2d 690, and is printed in the Appendix annexed hereto (pp. 9-11).

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on January 25, 1962. The jurisdiction of this Court is invoked under Section 2 of Article 3 of the Constitution of the United States, and Title 28, Section 1257(3) of the United States Code, this being a case of admiralty and maritime jurisdiction.

Questions Presented

1. Whether in a third-party action brought by a ship owner against a stevedore contractor for indemnity a jury's finding that the stevedore contractor did not breach its warranty of safe and workmanlike performance in unloading the vessel precludes an independent finding by the court that the unseaworthy condition of the vessel responsible for a workman's accident on board the vessel was directly brought about by the acts of the stevedore contractor and was due to its operation, so as to render the stevedore contractor liable over to the vessel under an express agreement of indemnity against injuries to "any other person, provided that such injury or death of such other person shall have been due to the contractor's operation."

2. Whether liability for breach of a stevedore contractor's warranty of safe performance necessarily implies fault or negligence on the part of the contractor.

Statement

Plaintiff in the main action sued respondent, Isbrandtsen Company, Inc., to recover damages for personal injuries suffered when he fell through an open unlighted hatch

on board the *S. S. John Franklin* (R. 10). He alleged negligence of the owner and unseaworthiness of the vessel. The negligence count was withdrawn during the trial and was not submitted to the jury (R. 446).

Isbrandtsen impleaded the petitioner, Universal Terminal & Stevedoring Corp., on three different theories: On an express provision of the stevedoring contract; on a common law theory of indemnity; and for breach of the stevedore contractor's warranty of safe and proper performance of its work (R. 23, 24, 25).

A jury trial was had in the State Supreme Court before Mr. Justice Beckinella. At the conclusion of the testimony, petitioner moved for a directed verdict which was denied (R. 480). It also moved to go to the jury on all three indemnity counts. The motion to go to the jury on the counts of common law indemnity and for breach of the stevedore's warranty of safe performance was granted, but the court denied petitioner's motion to go to the jury on the issues raised by the express provision of the stevedoring contract (R. 443).

The jury rendered a verdict in favor of the plaintiff against the respondent, and in favor of the petitioner on the indemnity counts (R. 513).

The court directed judgment in favor of respondent on the express provision for indemnity. In directing judgment the court made the following finding:

> "In the case at bar whatever unseaworthiness existed at the time resulting in plaintiff's injuries, was directly brought about by the acts of the third-party defendant and were due solely to its operation." (R. 521)

An appeal was taken to the Appellate Division, Second Judicial Department, from the judgment for indemnity. The Appellate Division unanimously reversed the judgment

and dismissed respondent's claim for indemnity. The opinion of the Appellate Division is printed at pages 537 to 541 of the record. On appeal to the Court of Appeals the judgment of the Appellate Division was reversed and the judgment of the court below reinstated.

The plaintiff, a ship's cleaner, fell through an open and unlighted hatch on the 'tween-deck of the *S. S. John Franklin* during the course of his employment (R. 62, 63). The respondent's employees had been unloading the vessel during the day and stopped working about an hour before the plaintiff met with his accident (R. 380).

It was conceded in the testimony that the hatches on the vessel are normally left open while it is being cleaned, so that the rubbish can be removed (R. 110, 295). It was also conceded that stevedores customarily leave the lower hatches open when the work of unloading has not been completed (R. 205, 292). It was also uncontradicted in the testimony that the ship had the duty of making proper lights available, and of having them rigged properly and placed where the workmen could get them when they were needed (R. 189, 203, 295).

There was testimony by the ship's officer who was on watch that it is necessary to have the hatches open all the way down while the cleaners are working on the ship (R. 356). He had made an entry in the log for that evening that the hatches were being left open for the convenience of the cleaners (R. 357). It was testified by another of the ship's officers that if the hatches were closed, they would have to be opened up immediately afterwards for the cleaners, a process which would involve waste of time and additional expense (R. 314, 315, 317).

There was testimony also from the ship's officer that he knew that the cleaners were coming on board after the stevedores stopped work and that the hatch covers were left off for that reason (R. 382).

The court instructed the jury that, if they found that the light was inadequate or that the hatch covers were off when they should properly have been on, then they could find that the ship was unseaworthy (R. 496). He further instructed the jury that if the plaintiff did recover in his action against respondent, and the unseaworthiness of the vessel was brought about through the negligence of the stevedore or through breach of its implied warranty of safe performance of its work, then they could find in favor of respondent on its claim for indemnity (R. 502, 503).

The provision for indemnity in the stevedore's contract, so far as relevant, reads:

> "The contractor will indemnify and hold harmless and defend Isbrandtsen Company, Inc., * * * against any and all claims or demands arising out of bodily injury * * * occurring * * * on any vessel owned or chartered by Isbrandtsen Co., Inc. or for which Isbrandtsen Co., is acting as agent, which claims are made by or on behalf of
>
> (1) any employee of the contractor, or
>
> (2) any other person, provided that such injury or death of such other person shall have been due to the contractor's operation." (R. 404, 405)

Despite the jury's finding that petitioner had not breached its warranty of safe performance of its operation, the trial judge found, as a matter of law, that the unseaworthiness was due solely to the petitioner's operation (R. 521). In unanimously reversing, the Appellate Division held that the findings implicit in the jury's verdict precluded such a construction of the indemnity agreement. The Court of Appeals, in reversing the Appellate Division, did not write an opinion. In its view, the plaintiff's injuries were due to the stevedore's operation, irrespective of fault.

Reasons for Granting the Writ

1. The decision of the Court of Appeals of the State of New York is, we submit, in direct conflict with the decisions of this Court in *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124, and *Weyerhaeuser S. S. Co.* v. *Nacirema Co.*, 355 U. S. 563, and unduly limits the scope of those decisions; it is also in conflict with the decision of the Court of Appeals for the Second Circuit in *Booth Steamship Co.* v. *Meier & Oelhaf Co.*, 262 F. 2d 310.

The petitioner in the State Court relied on the decisions in the cited cases. It contended that the jury's finding that petitioner had not breached its warranty of safe performance of the work precluded a finding by the court that the unsafe condition on the vessel was caused by, or due to, petitioner's operations. Since this claim was based on breach of contract, the concept of fault or negligence, on which the decision of the Court of Appeals of the State of New York is based, was irrelevant.

This Court held in the *Ryan Stevedoring* case that safety and competency in the performance of the stevedoring operation are inescapable elements of the service undertaken; they are part of the stevedore's "warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product". In the *Weyerhaeuser* case, it was pointed out that, in an action for breach of warranty, concepts of negligence, active or passive, were inappropriate. In *Booth Steamship Co.* the court was unanimous in deciding that liability without fault is an element of the warranty of workmanlike service.

In the case at bar the jury found that there was an unsafe condition on the vessel which was responsible for the plaintiff's injuries. In finding for petitioner on the issue of breach of warranty of safe performance of its work, the jury necessarily found that the unsafe condition on

the vessel was not caused by, and was not due to, petitioner's operations. Concepts of fault or negligence were not relevant on that issue and the court so charged the jury (R. 510).

Clearly the scope of the express agreement to indemnify was no wider than that of petitioner's warranty to perform its work safely. Petitioner agreed to indemnify the vessel against claims made by its own employees, without limitation; it agreed to indemnify the ship against loss through injury to persons other than its employees, provided such injury was due to its operation. The plaintiff in this action was not an employee of petitioner; he was an employee of an independent contractor engaged by the ship to do the cleaning. Indemnity for injury to him could not, therefore, be claimed unless his injury was caused by, or was due to, the stevedore's operation.

The area of petitioner's liability under its warranty of safe performance, insofar as workmen other than its own employees are concerned, was as broad as the area encompassed by the express provision for indemnity, and in each the concept of fault or negligence was irrelevant. In basing its decision on considerations of fault or negligence, the Court of Appeals of the State of New York obviously misconstrued this Court's definition of a stevedore contractor's warranty of safe and workmanlike performance.

2. The question here involved is of utmost importance.

The problem of ship owners' liability to workmen aboard the vessel and of their rights to indemnity from stevedore contractors has been considered by this Court in numerous recent cases. The definition and scope of the stevedore contractor's warranty of safe and workmanlike performance have been considered and developed in many decisions. (*Ryan Stevedoring Co.* v. *Pan-Atlantic Corp.*, 350 U. S. 124; *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563; *Crumady* v. *Joachim Hendrick Fisser*,

358 U. S. 423.) These decisions illustrate the importance of the question.

In Congress hearings have been, and are being, held on proposals further to clarify the question of third-party liability. These hearings reflect the intense interest of the shipping industry and of the admiralty bar in the subject. They reflect also the reliance of those appearing before the committees on the impartial reasoning and evaluation by the Judiciary in the cases thus far decided.

Thus it is crucial that the principles of law developed in the decisions be properly understood and applied and that State decisions which introduce principles alien to the law maritime be corrected. (*Chelentis* v. *Luckenbach S. S. Co., Inc.*, 247 U. S. 372.)

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

DECISION OF THE COURT OF APPEALS

Reported at 11 N. Y. 2d 690

JOSE L. CENTINO,

Plaintiff,

ISBRANDTSEN COMPANY, INC.,

Defendant and Third-Party Plaintiff-Appellant,

UNIVERSAL TERMINAL & STEVEDORING CORP.,

Third-Party Defendant-Respondent.

APPEAL from a judgment, entered June 23, 1961, upon an order of the Appellate Division of the Supreme Court in the Second Judicial Department which (1) reversed, on the law, so much of an amended judgment of the Supreme Court in favor of plaintiff against defendant and in favor of defendant as third-party plaintiff against third-party defendant, entered in Kings County upon a verdict rendered at a Trial Term (CHARLES J. BECKINELLA, J.) and upon a decision of said court, as directed recovery over against third-party defendant, and (2) dismissed the third-party complaint as against said third-party defendant. The action was commenced to recover damages for personal injuries sustained by plaintiff by reason of the alleged unseaworthiness of a ship belonging to defendant. Plaintiff, an employee of a ship scaling and servicing company which had been employed by defendant to clean the ship, the *S. S. Sir John Franklin*, was instructed by his supervisor to get a portable light which was lit in the far corner of the 'tween deck in hatch No. 3 on the ship. After picking up

the light plaintiff slipped on some debris and fell through the open hatchway into the hold of the ship. The accident occurred at about 5:40 P. M. on December 1, 1954. There was evidence that third-party defendant, a stevedoring company, was under a contract with defendant to unload the ship; that its work of unloading necessitated removal of the hatchway covers; that, on the day of plaintiff's fall, its employees had left the ship for the day at about 4:50 P. M.; that they did not replace the hatchway cover of hatch No. 3 when they left because not requested to do so by defendant, and that the lighting for that hatchway was inadequate. Defendant's contract with third-party defendant provided that "The contractor [third-party defendant] will indemnify and hold harmless and defend Isbrandtsen Company, Inc., as owner * * * against any and all claims or demands arising out of bodily injury including death at any time resulting therefrom, occurring * * * on any vessel owned * * * by Isbrandtsen Co., Inc. * * * which claims are made by or on behalf of * * * (2) any other person, provided that such injury or death of such other person shall have been due to the contractor's operation". The trial court submitted to the jury the issues of third-party defendant's alleged negligence and its alleged breach of warranty to perform its work safely and properly, reserving to itself the determination as to whether third-party defendant was liable under the indemnity agreement. In the Court of Appeals third-party defendant argued that the findings of the jury in favor of it on the issues submitted as questions of fact required a dismissal of the cause of action based on breach of the express covenant of indemnity.

Lawrence J. Mahoney, Robert J. Giuffra and *Albert D. Koch* for third-party plaintiff-appellant.

Patrick E. Gibbons and *Royce A. Wilson* for third-party defendant-respondent.

Judgment reversed and amended judgment of Trial Term in favor of third-party, Isbrandtsen Company, Inc., against third-party defendant, Universal Terminal & Stevedoring Corp., is reinstated, with costs against the latter in this court and in the Appellate Division. In our view, the injuries of plaintiff were "due to [respondent's] operation", irrespective of fault, and Trial Term was correct in holding respondent liable under the broad provisions of its indemnity agreement. No opinion.

Concur: Chief Judge DESMOND and Judges DYE, FULD, FROESSEL, VAN VOORHIS, BURKE and FOSTER.

Appendix

OPINION OF THE APPELLATE DIVISION

Reported at 13 A. D. 2d 977

JOSE L. CENTINO,

Plaintiff,

v.

ISBRANDTSEN COMPANY, INC.,

Defendant and Third-Party Plaintiff-Respondent,

UNIVERSAL TERMINAL & STEVEDORING CORP.,

Third-Party Defendant-Appellant.

In an action to recover damages for personal injuries sustained by reason of the unseaworthiness of defendant's ship, in which the defendant shipowner, Isbrandtsen Company, Inc., as third-party plaintiff, served a third party complaint against its stevedore, Universal Terminal & Stevedoring Corp., as third-party defendant, the stevedore appeals: (1) from so much of a judgment of the Supreme Court, Kings County, entered December 28, 1959, upon the verdict of the jury and the decision of the court, after a jury trial, as directs recovery over against it by the shipowner of the sum of $85,895.75, being the amount of the judgment awarded to plaintiff against the shipowner; (2) from so much of an amended judgment of said court, dated December 9, 1960, as directs recovery over against the stevedore by the shipowner of said sum of $85,895.75, plus costs of $150, attorneys' fees of $7,500, and attorneys' disbursements of $1,400.26, making a total of $94,946.01; and (3) from the order of said court, made on December 7, 1960

and entered on December 9, 1960, which granted the shipowner's motion for the entry of such amended judgment in its favor against the stevedore. Amended judgment, insofar as appealed from, reversed on the law, with costs to the third-party defendant against the third-party plaintiff; and judgment directed in favor of the third-party defendant dismissing on the merits the third-party complaint against it. Findings of fact implicit in the jury's verdict in favor of the third-party defendant are affirmed. Appeal from the original judgment dismissed; it was superseded by the amended judgment. Appeal from the order directing entry of the amended judgment dismissed. Since no point is made in the appellant's briefs with respect to such order, the appeal therefrom must be deemed to have been abandoned. The third-party complaint for indemnity alleges three causes of action: the first, based upon a contract by which the stevedore agreed to indemnify the shipowner; the second, based upon the stevedore's primary active negligence; and the third, based upon the stevedore's breach of its implied warranty to perform its work safely and properly. The issues raised by such first cause of action based upon the stevedore's contract, were reserved by the trial court for its determination. The issues raised by such second and third causes of action were submitted to the jury; and the jury found in favor of the stevedore, the third-party defendant. Thereafter the trial court determined the issues under the first cause of action and granted judgment in favor of the shipowner, the third-party plaintiff, against the stevedore. The plaintiff came on board the ship to do cleaning work. He was injured when he fell into an open hatchway, in respect of which the evidence shows that there was inadequate lighting. He sued the shipowner on the ground, as limited at the trial, of unseaworthiness of the vessel. The stevedore was under a contract with the shipowner to unload the ship. The stevedore's work necessitated removal of the

hatchway cover. The stevedore's employees had finished their work for the day. The evidence discloses that they did not replace the hatch-cover because of the request of the shipowner, who desired to save the expense of replacing the cover and of removing it almost immediately so that the cleaners could do their work. The plaintiff, one of the cleaners, was injured about one hour after the stevedore's employees had left the ship. The evidence establishes that there was no duty on the stevedore to furnish light for the hatchway at the time plaintiff was injured. The indemnity contract provides that the stevedore "will indemnify and hold harmless" the shipowner "against any and all claims or demands arising out of bodily injury * * * provided such injury * * * shall have been due to the contractor's [the stevedore's] operation." The Trial Justice correctly held that the duty of interpreting the indemnity contract was his. However, upon the evidence as stated by the stevedore and not controverted by the shipowner, and upon the relevant portions of the jury's verdict, we conclude that plaintiff's injury was not due to the stevedore's operation within the meaning of the contract between it and the shipowner. Beldock, Acting P. J., Ughetta, Kleinfeld, Christ and Pette, JJ., concur.

Appendix

OPINION OF TRIAL COURT

Plaintiff sued for personal injuries sustained by reason of the unseaworthiness of defendant's ship. The Jury brought in a verdict in his favor.

The defendant moved to set aside the verdict under Sec. 549 of the C. P. A. and for a verdict in its favor, notwithstanding, under Sec. 457a, subdivision 3. The Court feels the Jury was justified in its verdict upon the evidence and thus both of these motions are denied.

The Court reserved unto itself the decision in the third-party action of the defendant against Universal Stevedoring and Terminal Corp.. This action is predicated upon an express indemnity agreement, the pertinent part of which reads. "The contractor will indemnify and hold harmless the defendant Isbrandtsen Company, Inc. * * * against any and all claims or demands arising out of bodily injury * * * provided such injury * * * shall have been due to the contractors operation * * *."

A careful review of the applicable cases leads me to the conclusion that the third-party plaintiff is entitled to recover in full against the 3rd-party defendant the judgment recovered against it by the plaintiff Jose Lopez Centino.

None of the cases (*United States* v. *Harrison*, 245 F. 2d 911; *Amerocean S. S. Co.* v. *Copp*, 245 F. 2d 291; *Riddick* v. *McAllister Lighterage Line*, 258 F. 2d 297; *Trugstad* v. *State Marine Corp.*, 50 F. Supp. 556) cited by the third-party defendant as upholding its position is in point.

These are all cases in which the unseaworthy condition was created by the shipowner in the first instance.

In the case at bar whatever unseaworthiness existed at the time resulting in plaintiff's injuries was directly brought about by the acts of the third-party defendant and were due solely to its operation.

Enter Judgment accordingly.

C. J. B.
J. S. C.

Remittitur.

No. 327 COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at the Court of Appeals Hall, in the City of Albany, on the 25th day of January in the year of our Lord one thousand nine hundred and sixty-two, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge, *Presiding.*

RAYMOND J. CANNON, *Clerk.*

REMITTITUR January 25, 1962.

No. 327

Jose Lopez Centino,

Plaintiff,

vs.

Isbrandtsen Company, Inc.,

Defendant.

Isbrandtsen Company, Inc.,

Third-Party Plaintiff-Appellant,

vs.

Manuelo Castelo & ano., d/b/a C. & W. Ship Sealing & Servicing Co., &c., & ano.:

Third-Party Defendants,

and

Universal Terminal & Stevedoring Corp.,

Third-Party Defendant Respondent.

BE IT REMEMBERED, That on the 30th day of September in the year of our Lord one thousand nine hundred and

sixty-one, Isbrandtsen Company, Inc., the third-party plaintiff-appellant in this cause, came here unto the Court of Appeals, by Dougherty, Ryan, Mahoney & Pellegrino, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Universal Terminal & Stevedoring Corp., the third-party defendant-respondent in said cause, afterwards appeared in said Court of Appeals by Terhune, Gibbons & Mulvehill, its attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Lawrence J. Mahoney, of counsel for the appellant, and by Mr. Patrick E. Gibbons, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and the amended judgment of the Trial Term in favor of the third-party plaintiff, Isbrandtsen Company, Inc., against the third-party defendant, Universal Terminal & Stevedoring Corporation, reinstated, with costs in this Court and in the Appellate Division against the latter. In our view, the injuries of plaintiff were "due to [respondent's] operation", irrespective of fault and Trial Term was correct in holding respondent liable under the broad provisions of its indemnity agreement.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be reversed &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, January 25, 1962.

(SEAL)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

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BRIEF ON BEHALF OF ISBRANDTSEN COMPANY, INC., IN OPPOSITION TO WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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BRIEF ON BEHALF OF ISBRANDTSEN COMPANY, INC., IN OPPOSITION TO WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Counter-Statement to Questions Presented

Whether the Court of Appeals and the Trial Term of the State Court were correct in their findings that any unseaworthiness existing at the time of the accident was due to the stevedore's operations, which entitled the shipowner to recover under the terms of a written indemnity agreement which clearly established an intent to create responsibility on the stevedore irrespective of fault.

Statement of Facts

The plaintiff in the main action was an employee of C & W Ship Sealing & Servicing Co. which had been engaged by Isbrandtsen Company, Inc. to clean the SS.

"Sir John Franklin". On December 1, 1954 the Petitioner, Universal Terminal & Stevedoring Corp., hereinafter referred to as Universal, was discharging cargo from the #3 hatch aboard the vessel (R. 296). The longshoremen employed by Universal worked from 8:00 A. M. to approximately 5:00 P. M. The plaintiff, a cleaner employed by C & W Ship Scaling & Servicing Co., started work aboard the SS. "Sir John Franklin" at about 5:05 P. M. on December 1, 1954 (R. 62), and fell into the #3 hold at about 5:40 P. M. (R. 62).

Prior to his fall the plaintiff had descended from the main deck to the 'tween deck level of the vessel (R. 63), and was ordered by his superior to get a portable light which was lit in the far corner of the hatch (R. 64). After picking up the light, the plaintiff slipped on something under foot and fell through the hatch into the hold.

The evidence at the trial attributes plaintiff's fall to an open hatchway, inadequate lighting and the presence of debris under foot. The record disclosed that the plaintiff was employed to remove this debris and, accordingly, the Trial Court instructed the jury that unseaworthiness could not be premised upon the very condition that the plaintiff was there to remedy (R. 494-497) and, therefore, it appears that the jury's finding of unseaworthiness was either based upon the open hatches or inadequate lighting or a combination of both.

The undisputed evidence established that Universal's employees had removed the hatch covers (R. 346), and had left them off when they stopped work (R. 355). The portable lights which had been provided by the vessel were placed and arranged in the #3 hatch by the longshoremen (R. 350-351), and had been observed in the same position at about the time the longshoremen quit for the day (R. 354). Witnesses testified that these lights were still burning after the accident occurred.

The testimony also established that it is customary to close the top hatch at the main deck level when the long-

shoremen finish work at night (R. 356). The main deck hatch covers were left off presumably because the cleaners were to start work (R. 382), although the ship's officers did not specifically order the hatches left open (R. 380). It was uncontroverted that the longshoremen customarily leave the hatch covers off at the 'tween deck level when their work is to be continued the next day (R. 355), and the longshoremen did in fact finish their operations on the following morning (R. 354) and it was from the 'tween deck level that the plaintiff fell.

Prior to trial, the respondent served upon Universal a notice to admit pursuant to Section 322 of the New York Civil Practice Act. This notice, together with Universal's answers, was read into the record (R. 403-406), and Universal's admissions concede that on the date of the accident it was engaged in stevedoring services on the SS. "Sir John Franklin" in compliance with a stevedoring contract; that it removed the hatch boards at the #3 hatch; that it removed dunnage and left some in the cargo compartments; and that it placed the portable cluster lights in the #3 hatch and arranged them for use during the stevedore's discharging operations.

No evidence was introduced by the Petitioner to dispute the effect of the admissions contained in its answers to the notice to admit. The clause of the stevedoring contract by which Universal expressly agreed to indemnify Isbrandtsen stated as follows:

> "The contractor (Universal) will indemnify and hold harmless and defend Isbrandtsen Company, Inc., as owner or charterer of any vessel owned or chartered by it . . . against any and all claims or demands arising out of . . . bodily injury . . . which claims are made by or on behalf or (2) any other person, provided that such injury or death of such other person shall have been due to the contractor's (Universal) operation" (R. 404, 405).

After trial before the Court and jury, the Trial Judge submitted to the jury the issues between the plaintiff and

Isbrandtsen Company, Inc. in the main action on the sole ground of unseaworthiness and also submitted to the jury the cause of action based on Isbrandtsen's claim for common law indemnity and also for a breach of Universal's warranty of workmanlike performance (R. 444-502). The Trial Court reserved to itself the determination of the issues raised by the express agreement of indemnity between Universal and Isbrandtsen (R. 440-443). The Trial Judge directed judgment in favor of the respondent against Universal on the ground that the express indemnity agreement entitled Isbrandtsen to full indemnity. Specifically, it was found that whatever unseaworthiness caused the plaintiff's injuries was directly brought about by the actions of the stevedore and were due solely to its operations (R. 521).

The Appellate Division held that the plaintiff's injuries were not due to the stevedore's operations (R. 540-541), although it agreed that it was the duty of the Trial Judge to interpret the express indemnity contract. This decision of the Appellate Division was reversed by the Court of Appeals in which it held that the plaintiff's injuries were due to the stevedore's operations and that it would be liable under the broad provisions of its indemnity agreement. The decision of the Court of Appeals is reported at 11 N. Y. 2d 690.

REASONS FOR DENYING THE WRIT

I. The decision of the New York Court of Appeals is consistent with and in no way violates the holdings of the United States Supreme Court.

The decision of the Court of Appeals is not in conflict with the decisions of the Supreme Court in *Ryan Stevedoring Co.* v. *Pan Atlantic Steamship Co.*, 350 U. S. 124, and *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co., Inc.*, 355 U. S. 563, which cases are relied upon by the Petitioner seeking relief in this Court. Both of these

decisions relate to a right of indemnity by a shipowner against a stevedore based on a breach by the stevedore of an implied warranty to perform services for the vessel in a workmanlike manner. In neither of these cases was the Supreme Court concerned with the provisions of an express contract of indemnity.

A review of the authorities discloses that the Courts have regularly enforced indemnification contracts even where the indemnitor's assumption of liability was predicated on specific conditions. A concise review of the function of indemnity contracts in the maritime industry is contained in *Puleo* v. *Moss*, 2 Cir., 1947; 159 F. 2d 842, cert. den., 331 U. S. 847 (1947), one of the few decisions which considered an indemnification clause as broad as the one considered here. The pertinent clause provided that the contractor "save harmless . . . the owner of the vessel from all suits or actions . . . to which . . . the owner . . . may be subjected or put by reason of injury to the person or property of another arising . . . out of the performance of the contract by the contractor." The Court of Appeals for the Second Circuit awarded full indemnity to the shipowner from the contractor, a repair company, which had employed the injured plaintiff.

In analyzing the indemnity agreement, the Court pointed out that a contractual obligation to indemnify another does not depend upon the fault of the indemnitor. Full indemnity was given, but the Court stated specifically that it did not find the indemnitor at fault, as fault on the part of the contractor was not necessary to enforce the indemnity agreement.

At page 846, the Court described the indemnity arrangement as a business procedure which was a natural and reasonable reflection of the type of operations carried on by the parties. Here, it was stated:

> "Although this results in imposing upon the Robins Company liabilities for which the Moss Company

would have been solely liable even if the Robins Company did not need the protection of the statute, there is nothing surprising in that. *The parties were dealing only with imputed liabilities; the damages had to be paid by one of two groups of persons who would not be personally at fault anyway.* We are not to construe the contract as though the Robins shareholders had to pay losses for which the Moss shareholders would be responsible because of any personal delinquency. The losses were imposed as a condition of carrying on the business of the Robins Company; losses of a kind which it has long been the practice to treat as expenses of the business, and to spread over the whole business by insurance of one kind or another. It was in no sense unreasonable therefore that the Robins Company should be willing to escape controversies as to joint and several fault between itself and the ships that came to its yard, to accept liability for all accidents that might occur during repairs, and to load the contract price with the necessary premium." (Italics ours.)

The fact that the jury returned a verdict in favor of Universal on the cause of action based on common law indemnity and a breach of the implied warranty is not germane to the stevedore's liability under the terms of the expressed indemnity agreement. Liability of the stevedore based upon the implied warranty of performance depended upon proof that Universal had breached its implied warranty by doing its work improperly or incompetently. *Ryan v. Pan Atlantic Steamship Co., supra.* However, the reported decisions clearly indicate that the liability of the indemnitor under an express indemnity agreement does not depend upon proof of negligence.

A/S J. Ludwig Mowinckels Rederi v. Commercial Stevedoring Co., 2 Cir., 1958; 256 F. 2d 227, app. dis., 1959; 358 U. S. 801.

Piezie v. *Erie Railroad Company*, 165 F. Supp. 216, 1958, aff'd 2 Cir., 1959; 264 F. 2d 136.

J. B. McNicholas Transfer Co. v. *Pennsylvania Railroad Company*, 6 Cir., 1946; 154 F. 2d 265.

Rice v. *Pennsylvania Railroad Company*, 2 Cir., 1953; 202 F. 2d 861.

Ferriman v. *Ocean Transport Ltd.*, 201 F. Supp. 173, 1961.

It is submitted that the Court of Appeals was correct in holding that the stevedore was liable under the terms of the express indemnity agreement. The words of the indemnity clause were clear and unambiguous and the evidence at the trial established that the plaintiff's injuries were a direct result of the stevedore's operations.

II. No basis for the granting of this petition for certiorari has been demonstrated by the petitioner.

The Petitioner has failed to establish that the decision of the New York Court of Appeals is in conflict with any decision of the Supreme Court of the United States or the Circuit Court of Appeals.

The New York Court of Appeals correctly interpreted the express contract of indemnity between the parties within the framework of the factual evidence presented at the trial. It is significant to note that the only decisions referred to by the Petitioner in support of this writ dealt with cases concerning the right of recovery against the stevedores by a shipowner based on breach by the former of an implied warranty. No reference is made to any decision dealing with an express indemnity clause between the shipowner and the stevedore. What the Petitioner is trying to do is to proceed by certiorari to review a decision of the New York Court of Appeals concerning the construction of a particular contract of indemnity. This agreement applied only to these parties, and has no application to the industry in general.

Even if the subject matter of this Petition is subject to the review of this Court, this relief should be denied, as no substantial Federal question has been raised by the Petitioner herein. The question which this Court is asked to decide is not of paramount importance to the shipping industry and the maritime bar. In recent years, the liability of stevedores under concepts of breach of implied warranty has been discussed and reviewed at great lengths in view of the decisions of the Supreme Court in *Ryan* and *Weyerhaeuser, supra.* The question of liability of stevedores to a shipowner under the terms of an express indemnity agreement have been of relative little importance because of the decisions relating to breach of implied warranty.

CONCLUSION

The petition for writ of certiorari should therefore be denied.

Respectfully submitted,

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